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10  
11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE DISTRICT OF ARIZONA**

13 Clarence Wayne Dixon,  
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Petitioner,

vs.

David Shinn, et al.,  
Respondents.

No. CV-14-258-PHX-DJH

DEATH-PENALTY CASE

**State Court Record**  
**Pinal County Superior Court, No. S1100CR202200692**  
**Record on Appeal, ROA 25–29**

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16 Counsel for Defendant

17 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
18 **IN AND FOR THE COUNTY OF PINAL**

19 STATE OF ARIZONA,

20 Plaintiff,

21 v.

22 CLARENCE WAYNE DIXON,

23 Defendant.

Pinal County Case No.  
S1100CR202200692

Maricopa County Case No. CR2002-  
019595

Arizona Supreme Court Case No. CR-08-  
0025-AP

24 **REPLY IN SUPPORT OF MOTION**  
25 **TO DETERMINE MENTAL**  
26 **COMPETENCY TO BE EXECUTED**  
27 **(Capital Case)**

(Hon. Robert Carter Olson)

28 Clarence Wayne Dixon, through undersigned counsel, hereby replies<sup>1</sup> in support of his Motion to Determine Mental Competency to be Executed (“Motion”). The State’s Response to Mr. Dixon’s Motion is unavailing, first, because Mr. Dixon has demonstrated

<sup>1</sup> Mr. Dixon has concurrently filed a Motion to Exceed the 6-page limit on reply memoranda found in Ariz. R. Crim. P. 1.9(c).

1 his entitlement to a hearing on his mental incompetency to be executed under *Ford v.*  
 2 *Wainwright*, 477 U.S. 399 (1986) and *Panetti v. Quarterman*, 551 U.S. 930 (2007);  
 3 second, because the State fails to show that a hearing is not required under A.R.S. § 13-  
 4 4022 and *Ford*; and finally, because the State has presented no evidence whatsoever to  
 5 rebut the expert opinion of psychiatric expert, Lauro Amezcua-Patino, M.D., that Mr.  
 6 Dixon is presently mentally incompetent to be executed.

7 **I. Mr. Dixon has demonstrated his entitlement to a competency hearing**  
 8 **under *Ford v. Wainwright* and *Panetti v. Quarterman***

9 “[T]he Eighth Amendment prohibits a State from carrying out a sentence of death  
 10 upon a prisoner who is insane.” *Ford*, 477 U.S. at 409–10. In so holding the Supreme  
 11 Court reasoned that it “is no less abhorrent today than it has been for centuries to exact in  
 12 penance the life of one whose mental illness prevents him from comprehending the  
 13 reasons for the penalty or its implications.” *Id.* at 417. “Under *Ford*, once a prisoner makes  
 14 the requisite preliminary showing that his current mental state would bar his execution,  
 15 the Eighth Amendment, applicable to the States under the Due Process Clause of the  
 16 Fourteenth Amendment, entitles him to an adjudication to determine his condition.”  
 17 *Panetti*, 551 U.S. at 934–35.

18 The Court clarified *Ford*’s substantive incompetency standard in *Panetti* where it  
 19 rejected “a strict test for competency [to execute] that treats delusional beliefs as irrelevant  
 20 once the prisoner is aware the State has identified the link between his crime and the  
 21 punishment to be inflicted.” *Id.* at 960. Repudiating a competency standard that focuses  
 22 on a prisoner’s mere “awareness of the State’s rationale for an execution,” *id.* at 959, the  
 23 Court held that a prisoner must also have a rational understanding of the State’s reason  
 24 for his execution—that is, he must be able to “comprehend[] the *meaning and purpose* of  
 25 the punishment to which he has been sentenced,” *id.* at 960 (emphasis added).

26 Mr. Dixon’s Motion to Determine Mental Competency to be Executed and  
 27 supporting expert psychiatric evidence made “a substantial threshold showing” that he is  
 28 mentally incompetent to be executed under *Ford* and *Panetti* so as to mandate a hearing.

1 *Ford*, 477 U.S. at 426 (Powell, J., concurring); *Panetti*, 551 U.S. at 934–35; *id.* at 949  
2 (discussing *Ford*’s holding that once a prisoner has made “a substantial threshold showing  
3 of insanity, the protection afforded by procedural due process includes a fair hearing in  
4 accord with fundamental fairness” (internal quotations omitted)). That expert evidence—  
5 which remains uncontroverted—shows that: (1) Mr. Dixon is diagnosed with paranoid  
6 schizophrenia (Motion, Ex. 9 at 11); (2) schizophrenia “is a neurodevelopmental disorder”  
7 that “is diagnosed based on the presence and severity of symptoms, including  
8 hallucinations, delusions, [and] thought disorder” (*id.*); (3) Mr. Dixon’s “capacity to  
9 understand the rationality of his execution is contaminated by the schizophrenic process  
10 which results in his deluded thinking about the law, the judicial system, his own lawyers,  
11 and his ultimate execution despite multiple attempts over many years to disabuse him of  
12 his irrational beliefs[]” (*id.* at 13); and (4) Mr. Dixon has a present “inability to form a  
13 rational understanding of the State’s reasons for his execution[]” (*id.* at 12–13).

14 The State has presented no medical or psychiatric evidence to rebut the showing  
15 that Mr. Dixon presently “lacks a rational understanding of the State’s reasons for his  
16 execution[]” (*id.* at 13), and therefore he is incompetent to be executed. Instead, the State  
17 offers the subjective opinion of its lawyers that “Dixon’s focus on the legal theory  
18 challenging the DNA evidence as the fruit of a purportedly unlawful arrest in fact  
19 demonstrates that *he rationally understands that the State seeks to execute him based on*  
20 *his conviction of the 1978 murder.*” (Response at 7 (emphasis added).) But that is precisely  
21 the incorrect standard for assessing a prisoner’s incompetency to be executed that the  
22 Supreme Court rejected in *Panetti*. 551 U.S. at 959 (“A prisoner’s awareness of the State’s  
23 rationale for an execution is not the same as a rational understanding of it. *Ford* does not  
24 foreclose inquiry into the latter.”).

25 This Court’s acceptance of the State’s argument would simply replicate the error  
26 committed by the Texas court in *Panetti* where, despite the fact that the petitioner—like  
27 Mr. Dixon—made an un rebutted “substantial showing of incompetency,” *id.* at 938, 948,  
28 the state court reached its competency determination without holding a hearing or



1 providing the petitioner with an adequate opportunity to provide his own expert evidence  
2 at a hearing, *id.* at 950. The Supreme Court found the Texas court’s procedures so deficient  
3 that its adjudication of Panetti’s incompetency claim “cannot be reconciled with any  
4 reasonable application of the controlling standard in *Ford*[,]” *id.* at 952–53, and that there  
5 was “a strong argument the court violated state law by failing to provide a competency  
6 hearing[.]” *id.* at 950. This Court should refrain from making the same mistake.

7       The State’s argument also defies *Ford*. A majority of the *Ford* Court found  
8 constitutionally inadequate Florida’s procedures for determining whether a prisoner is  
9 mentally incompetent to be executed because those procedures—which were ex parte and  
10 confined exclusively within the Executive Branch—denied the petitioner the opportunity  
11 to prove his incompetency claim through a meaningful fact-finding process. 477 U.S. at  
12 413–14 (“[C]onsistent with the heightened concern for fairness and accuracy that has  
13 characterized our review of the process requisite to the taking of a human life, we believe  
14 that any procedure that precludes the prisoner or his counsel from presenting material  
15 relevant to his sanity or bars consideration of that material by the factfinder is necessarily  
16 inadequate.”); *id.* at 424 (Powell, J., concurring) (“It is clear that an insane defendant’s  
17 Eighth Amendment interest in forestalling his execution unless or until he recovers his  
18 sanity cannot be deprived without a ‘fair hearing.’ Indeed, fundamental fairness is the  
19 hallmark of the procedural protections afforded by the Due Process Clause.”); *id.* at 430  
20 (O’Connor, J., concurring) (finding that “Florida’s procedures are inadequate to satisfy  
21 even the minimal requirements of due process in this context[.]”).

22       The Court left to the States “the task of developing appropriate ways to enforce the  
23 constitutional restriction upon its execution of sentences.” *Id.* at 416–17 (footnote  
24 omitted). Arizona implements *Ford*’s mandate in A.R.S. § 13-4022. This Court  
25 conscientiously applied A.R.S. § 13-4022, *Ford*, and *Panetti* when it granted Mr. Dixon’s  
26 Motion and ordered a hearing.

**II. Mr. Dixon’s Motion satisfies A.R.S. § 13-4022(C) and the State fails to show otherwise**

The State maintains that Mr. Dixon has failed to establish “reasonable grounds for a competency examination” because “the Maricopa County PCR Court, federal district court, and Ninth Circuit unanimously concluded[] that Dixon’s focus on the [NAU] issue, though legally untenable, failed to demonstrate a lack of competency.” (Response at 6.) But that argument fails for three reasons.

First, the State’s argument ignores that prior courts were all adjudicating a Sixth Amendment ineffective-assistance-of-counsel (“IAC”) claim under the “highly deferential” standard set forth by *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“Judicial scrutiny of counsel’s performance must be highly deferential.”), rather than an Eighth Amendment incompetency-to-be-executed claim arising under *Ford*, which is the claim at issue in these proceedings. Second, whether or not courts have previously determined that Mr. Dixon was competent to stand trial 20 years ago is irrelevant to the question of whether Mr. Dixon is mentally competent to be executed now. And finally, while the State may disagree with Dr. Amezcua-Patino’s expert opinion that Mr. Dixon’s deluded and conspiratorial thought content—which are functions of his diagnosed paranoid schizophrenia—render him incompetent to be executed, it has so far presented no evidence to rebut it.

The State concedes that Mr. Dixon’s Motion is timely (*see* Response at 6 n.1) but disputes that he has demonstrated “reasonable grounds for a competency determination” under A.R.S. § 13-4022(C) because prior courts allegedly found Mr. Dixon competent to stand trial and waive counsel 20 years ago despite his perseveration over the legal issue involving the NAU police. (Response at 6–9). The State’s argument completely ignores that these prior courts were all adjudicating a Sixth Amendment ineffective-assistance-of-counsel (“IAC”) claim under the “highly deferential” standard set forth by *Strickland*, 466 U.S. at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential.”).

In state postconviction proceedings, Mr. Dixon argued that his trial lawyer was

1 ineffective in violation of his Sixth Amendment rights for “fail[ing] to challenge [his]  
 2 competency to waive counsel when he knew of Dixon’s serious mental health history, his  
 3 two prior Rule 11 proceedings and his NGRI after which Dixon was ordered committed  
 4 to the Arizona State Hospital and not yet restored to competency.” (Ex. 16 at 3.) The  
 5 postconviction court, applying *Strickland*, rejected Mr. Dixon’s IAC claim after finding  
 6 that his trial lawyer “did not act unreasonably in failing to challenge [Dixon’s]  
 7 competency before he was allowed to waive counsel, nor was his performance deficient  
 8 at any point during his representation.” (Ex. 17 at 7.)

9 During federal habeas proceedings, meanwhile, Mr. Dixon again asserted his Sixth  
 10 Amendment IAC claim, arguing that he “received ineffective assistance of trial counsel  
 11 when his lawyer failed to challenge Dixon’s competency to stand trial and waive  
 12 counsel[.]” (Ex. 18 at i.) Mr. Dixon also argued that he was “tried and sentenced while  
 13 legally incompetent” in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment  
 14 rights. (*Id.*) Not only was Mr. Dixon’s IAC claim subject to *Strickland*’s “highly  
 15 deferential” standard, but federal habeas review of the claim was also subject to added  
 16 deference under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). *See* 28  
 17 U.S.C. § 2254. “When § 2254(d) applies, the question is not whether counsel’s actions  
 18 were reasonable. The question is whether there is any reasonable argument that counsel  
 19 satisfied *Strickland*’s deferential standard.” *Harrington v. Richter*, 562 U.S. 86, 105  
 20 (2011). “If this standard is difficult to meet, that is because it was meant to be.” *Id.* at 102.

21 The federal district court recognized that “[s]urmounting *Strickland*’s high bar is  
 22 never an easy task, . . . and [e]stablishing that a state court’s application of *Strickland* was  
 23 unreasonable under § 2254(d) is all the more difficult.” (Ex. 19 at 10 (internal quotation  
 24 omitted) (citing *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010), and *Richter*, 562 U.S. at  
 25 105 (“The standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’ and  
 26 when the two apply in tandem, review is ‘doubly’ so[.]” (internal citations omitted))).).  
 27 Bound by these deferential standards of review, the district court denied Mr. Dixon’s IAC  
 28 claim without reviewing it on the merits and only after concluding that “[t]he PCR court’s

1 rejection of this claim satisfies neither § 2254(d)(1) nor (2).” (Ex. 19 at 15.) With respect  
2 to Mr. Dixon’s claim that his constitutional rights were violated when was tried and  
3 sentenced while legally incompetent, the district court found the claim procedurally  
4 defaulted and never reviewed it on the merits either. (Ex. 19 at 15–16, 21 (holding that  
5 because “Dixon did not raise these claims in state court, [ ] they are procedurally  
6 defaulted[.]”).)

7 Mr. Dixon reurged both claims on appeal to the Ninth Circuit. (Ex. 20 at i), and  
8 that court similarly denied relief under *Strickland*’s and AEDPA’s “highly deferential”  
9 standards, see *Dixon v. Ryan*, 932 F.3d 789, 802 (9th Cir. 2019) (“In the AEDPA context,  
10 . . . the pivotal question is whether the state court’s application of the *Strickland* standard  
11 was unreasonable, which is different from asking whether defense counsel’s performance  
12 fell below *Strickland*’s standard. . . . Accordingly, establishing that a state court’s  
13 application of *Strickland* was unreasonable under § 2254(d) is . . . difficult.” (cleaned up)).

14 As the foregoing illustrates, none of the courts on whose decisions the State’s  
15 Response relies adjudicated an Eighth Amendment incompetency-to-be-executed claim  
16 arising under A.R.S. § 13-4022, *Ford*, or *Panetti*—which is the claim at issue here and  
17 the one on which Mr. Dixon’s Motion relies. Nor could those courts have done so since  
18 incompetency-to-be-executed claims only become ripe once a prisoner’s execution date  
19 has been set. See *Panetti*, 551 U.S. at 943–47.

20 Even assuming the State were correct (it is not, as already discussed) that courts  
21 have previously determined that Mr. Dixon was mentally competent for purposes of  
22 standing trial nearly 20 years ago, that is simply irrelevant to the question of whether Mr.  
23 Dixon is mentally competent to be executed now. See *Ford*, 477 U.S. at 410 (“The Eighth  
24 Amendment prohibits the State from inflicting the penalty of death upon a prisoner who  
25 is insane.”). Moreover, the State’s claim that *prior* competency findings necessarily  
26 foreclose a *current* inquiry into whether Mr. Dixon is mentally competent to be executed  
27 was squarely rejected by the U.S. Supreme Court in *Panetti* where it held that “[p]rior  
28 findings of competency do not foreclose a prisoner from proving he is incompetent to be

1 executed because of his present mental condition.” 551 U.S. at 934. The Supreme Court  
2 did not stop there. It further held that “[u]nder *Ford*, once a prisoner makes the requisite  
3 preliminary showing that his current mental state would bar his execution, the Eighth  
4 Amendment, applicable to the States under the Due Process Clause of the Fourteenth  
5 Amendment, *entitles* him to an adjudication to determine his condition.” *Panetti*, 551 U.S.  
6 at 934–35 (emphasis added). This is precisely what Mr. Dixon’s Motion seeks.

7       The State’s Response also fails to explain how the record before the Court in  
8 support of Mr. Dixon’s Motion falls short of constituting “reasonable grounds” for his  
9 mental competency to be executed to be assessed. (*See* Response at 6–9.) Mr. Dixon’s  
10 Motion is supported by the expert psychiatric report of Dr. Amezcua-Patino and 131 pages  
11 of exhibits. (*See generally* Motion & Exs. 1–15.) Dr. Amezcua-Patino opines that, “In my  
12 best opinion, Clarence [Dixon] suffers from a psychiatrically determinable impairment  
13 that significantly affects his ability to develop a rational understanding of the State’s  
14 reasons for his execution.” (*Id.* Ex. 9 at 12.) While the State may disagree with Dr.  
15 Amezcua-Patino’s expert psychiatric opinion, it fails to rebut it and will have the  
16 opportunity to do so at the May 3, 2022 hearing ordered by the Court in this matter. And  
17 as already discussed *supra*, the State’s attempt to contest Dr. Amezcua-Patino’s opinion  
18 based on prior courts’ rejection of an IAC claim misses the mark.

## 19 **II. Conclusion**

20       For all of the foregoing reasons and those set forth in his Motion and supporting  
21 exhibits, Mr. Dixon respectfully asks that the Court grant his Motion and affirm the May  
22 3, 2022 hearing date.

23 //

1 Respectfully submitted this 18th day of April, 2022

2 Jon M. Sands  
3 Federal Public Defender

4 Cary Sandman  
5 Amanda C. Bass  
6 Eric Zuckerman  
7 Assistant Federal Public Defenders

8 s/ Amanda C. Bass  
9 Counsel for Defendant



**Certificate of Service**

I hereby certify that on April 18, 2022, I electronically filed the foregoing Reply in Support of Motion to Determine Mental Competency to be Executed with the Pinal Clerk's Office by using the Court's eFiling system. Copies of the foregoing were electronically mailed this date to:

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s/ Jessica Golightly  
Assistant Paralegal  
Capital Habeas Unit

State of Arizona v. Clarence Wayne Dixon  
Exhibits to Reply in Support of Motion to Determine  
Mental Competency to be Executed

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- Exhibit 16 Petition for Post-Conviction Relief at 1–3, *State v. Dixon*, No. CR 2002-019595 (Maricopa Cnty. Super. Ct. Mar. 18, 2013)
- Exhibit 17 Minute Entry dismissing Petition for Post-Conviction Relief at 4–7, *State v. Dixon*, No. CR 2002-019595 (Maricopa Cnty. Super. Ct. July 3, 2013)
- Exhibit 18 Petition for Writ of Habeas Corpus at i, *Dixon v. Ryan*, No. CV-14-258-PHX-DJH (D. Ariz. Dec. 19, 2014), ECF No. 27
- Exhibit 19 Order re Claims 1, 2 at 8–22, *Dixon v. Ryan*, No. CV-14-258-PHX-DJH (D. Ariz. Mar. 16, 2016), ECF No. 61
- Exhibit 20 Opening Brief of Appellant at i, *Dixon v. Ryan*, No. 16-99006 (9th Cir. Feb. 17, 2017), ECF No 16

# Exhibit 16

MICHAEL H. JEANES, CLERK  
BY: *J. Ratner* DEP  
FILED  
MAR 18 PM 1:46

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Attorney for Petitioner

**IN THE SUPERIOR COURT OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA,

Plaintiff,

vs.

CLARENCE WAYNE DIXON,

Petitioner.

Case No.: CR2002-019595

**PETITION FOR POST-CONVICTION  
RELIEF**

**(CAPITAL CASE)  
(EVIDENTIARY HEARING REQUESTED)  
(Assigned to The Hon. Joseph Welty)**

Petitioner, **CLARENCE WAYNE DIXON**, (hereinafter "Dixon") by and through his counsel undersigned, and the law firm of DROBAN & COMPANY, PC, respectfully petitions this court for post-conviction relief pursuant to Rule 32.1 Arizona Rules of Criminal Procedure, based on ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution.

More specifically, assigned lead Deputy Maricopa County Public Defender failed to challenge Dixon's waiver of counsel when he knew Dixon likely suffered from psychological impairments at the time of the murder, previously participated in two Rule 11 proceedings and was declared NGRI (and *not* restored to competency) only *thirty-six* hours before the murder by former Judge Sandra O'Connor who committed Dixon to the Arizona State Hospital.

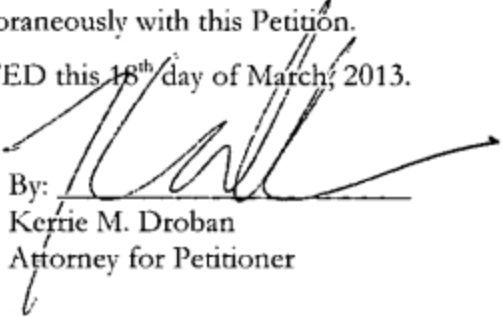
While counsel eventually disclosed this information to Dixon's subsequent advisory counsel, Mr. Kenneth Countryman and Nathaniel Carr, they too failed to alert Judge Klein of Dixon's mental status, challenge Dixon's competency to represent himself or develop and present significant mitigation that would have confirmed Dixon suffered from schizophrenia and other

1 mental impairments. Had a jury been privy to said information it would likely have sentenced  
2 Dixon to life; similarly, had the Judge known of Dixon's mental health history he may never have  
3 permitted Dixon to waive counsel. Moreover, it is likely the judge would have ordered Dixon to  
4 submit to competency proceedings and/or commitment at the Arizona State Hospital.

5 Petitioner additionally continues to assert that Arizona's death penalty statute on its face  
6 and as applied in this case violates his rights under the Fifth, Sixth, Eighth and Fourteenth  
7 Amendments, U.S. Constitution. See, Rule 32.1(A), *Arizona Rules of Criminal Procedure*. Petitioner's  
8 sentence should be vacated and reduced to life because the mitigating circumstances available to  
9 counsel at the time of Dixon's trial and as further developed in this PCR clearly outweigh aggravation  
10 in this case. Alternatively, Dixon's death sentence should be vacated and his case remanded for further  
11 proceedings consistent with the mental health issues identified and detailed in this petition.

12 This Petition is more fully supported by the following Memorandum of Points and  
13 Authorities, entire record in this case and separately filed Appendix of Exhibits, Affidavits and  
14 Declarations which are filed contemporaneously with this Petition.

15 RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of March, 2013.

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By: \_\_\_\_\_  
Kerrie M. Droban  
Attorney for Petitioner

1 **ISSUES PRESENTED FOR RELIEF**

2 1. The Arizona Supreme Court deprived Dixon of his rights to a fair sentencing and due  
3 process under the Fifth, Eighth, and Fourteenth amendments to the United States Constitution  
4 when it affirmed his death sentence on independent review<sup>1</sup>.

5 2. Dixon received ineffective assistance of counsel in violation of his rights under the Sixth  
6 and Fourteenth Amendments to the United States Constitution when his deputy Maricopa County  
7 Public Defender failed to challenge Dixon's competency to waive counsel when he knew of  
8 Dixon's serious mental health history, his two prior Rule 11 proceedings and his NGRI after which  
9 Dixon was ordered committed to the Arizona State Hospital and not yet restored to competency.

10 3. Dixon was deprived effective representation when his advisory counsel failed to  
11 challenge Dixon's competency to waive counsel, inform the Court of Dixon's mental illness, and  
12 develop significant mitigation that, had it been presented to the jury, would have revealed Dixon's  
13 schizophrenia and likely have altered the verdict in favor of a life sentence.  
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<sup>1</sup> *State v. Dixon* 226 Ariz. 545, 250 P.3d 1174 (2011); In the interest of brevity, this PCR will focus on issues 2 and 3 without waiving the first.



# Exhibit 17

Michael K. Jeanes, Clerk of Court  
\*\*\* Electronically Filed \*\*\*  
07/03/2013 8:00 AM

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR 2002-019595

07/02/2013

HON. ANDREW G. KLEIN

CLERK OF THE COURT  
C. Vila  
Deputy

STATE OF ARIZONA

LAURA PATRICE CHIASSON  
COLLEEN CLASE

v.

CLARENCE WAYNE DIXON (A)

KERRIE M DROBAN

APPEALS-PCR  
CAPITAL CASE MANAGER  
COURT ADMIN-CRIMINAL-PCR  
VICTIM WITNESS DIV -AG-CCC

MINUTE ENTRY

The Court has reviewed the Defendant's Petition for Post-Conviction Relief (filed 3/18/2013), the State's Response to Petition for Post-Conviction Relief (filed 6/3/2013), and the Defendant's Reply (filed 6/17/2013), as well as the Court's file. This is the Defendant's first Rule 32 proceeding following the Arizona Supreme Court's affirmance of his conviction and death sentence in *State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174 (2011).

At trial, Defendant waived representation and appeared *pro se*, assisted by advisory counsel. Defendant was convicted by jury verdict of first degree murder, both premeditated and felony murder. The jury unanimously found at the aggravation phase that Defendant had previously been convicted of a crime punishable by life imprisonment, A.R.S. § 13-751(F) (1), and that the murder was especially cruel and heinous A.R.S. § 13-751(F) (6). Following a penalty phase, the jury determined that the mitigation presented was not sufficiently substantial to call for leniency and returned a verdict of death. The Arizona Supreme Court affirmed the trial court on all of the issues Defendant raised on direct appeal.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR 2002-019595

07/02/2013

Defendant bears the burden of establishing that counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Moreover, judicial scrutiny of counsel's performance must be highly deferential. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *See id.* at 689.

*Strickland* further instructs:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

*See id.* at 694.

Defendant cites consistently to the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases to establish deficient performance in connection with both trial and advisory counsels' representation. However, it has been held by both the U.S. Supreme Court and Arizona Supreme Court that the ABA standards are only guides to what reasonableness means, not its definition. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *State v. Kiles*, 222 Ariz. 25, 213 P.3d 174 (2009). Instead, the proper standard for attorney performance is that of "reasonably competent assistance." *See Trapnell v. United States*, 725 F.2d 149, 153-5 (2d Cir. 1983).

The Court begins with the presumption that the actions of counsel were reasonable and their performance not deficient. The Court will first address the argument that Defendant received ineffective assistance from the Deputy Public Defender who represented him before his waiver of counsel, and then will address issues related to advisory counsel.

**A. Deputy Public Defender**

Defendant alleges that the Deputy Public Defender, who represented him before he was allowed to represent himself, was ineffective because he failed to challenge Defendant's competency to waive counsel. Defendant claims that his counsel should have apprised the Court

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR 2002-019595

07/02/2013

of his serious mental health history, his prior Rule 11 proceeding(s), and his Not Guilty By Reason of Insanity verdict (“NGRI”) entered just 36 hours before Deanna Bowdoin’s murder. However, this Court, without remembering specifically all the events from seven years ago, believes that it must have been aware of these matters. In that event, Defendant would not have been prejudiced by any perceived failure on counsel’s part to inform the Court of them.

It has always been this Court’s practice to thoroughly review every file assigned to the Court before taking the bench to address issues pertinent to that file. Such a practice would have been followed here, especially given the magnitude presented by a death penalty case.

The Court believes it addressed with all counsel in chambers before Defendant was permitted to waive his right to counsel some of Defendant’s mental health history to gain a better understanding of the issues that faced the Court if it granted Defendant’s request. The Court also informed counsel on the record that it had extensively reviewed the file before proceeding with the March 16, 2006 hearing on Defendant’s right to waive counsel.

A review of the file would have revealed that on September 25, 2003, a “Notice of Possible Defense of Insanity” was filed based upon the fact that Defendant was adjudged to be NGRI on January 5, 1978. The Court’s file would have further shown that Defendant made several requests to extend certain filing deadlines because he was contemplating a possible insanity defense. Accordingly, because this Court was in possession of information that placed Defendant’s mental health at issue, Defendant’s counsel could not have been ineffective in failing to give the Court information it already had.

For example, Defendant contends that his Public Defender should have informed the Court before the waiver of counsel hearing that Defendant had been involved in Rule 11 proceedings. But it is clear that the Court already knew of this. Otherwise, why would the Court have questioned Defendant about his experience in Rule 11 court during the colloquy concerning the waiver of counsel? Defendant acknowledged being in Rule 11 in 1977 but stated unequivocally that he did not have any mental problems that would prevent him from proceeding to trial. His counsel agreed that Defendant had no mental problems that would place his ability to waive the right to counsel in jeopardy.

To the extent Defendant argues that it was incumbent on this Court to order that he undergo a competency evaluation before allowing him the right to waive trial, the truth is that Defendant was adamant that he would not submit to such an evaluation. He objected to a competency evaluation and said that if one was ordered he would refuse to participate. See Defendant’s Objection to Prescreening Evaluation filed on April 14, 2003.

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This Court held a lengthy colloquy with Defendant before accepting both his oral and written waiver of counsel. Defendant was fully explained the benefits of having an attorney represent him and the significant dangers in representing himself. He was told that his chances of success were lessened if he represented himself, and he indicated that he understood. He was told that he would have full responsibility for all aspects of his case, which was complicated, and he was made aware of the dangers and disadvantages of self-representation. He was also informed that he could still request a lawyer at any point in the proceeding and that, if he did, one would be appointed for him.

This Court had a history with this Defendant before the March 16, 2006 hearing on the waiver of counsel and remembers him well. During Defendant's previous appearances, the Court had ample opportunity to observe Defendant, speak with him, and review his written work product. At all times, the Court found Defendant to be able to adequately advance his positions, he was cogent in his thought processes, lucid in argument, and always able to respond to all questions with appropriate answers. At no time did Defendant appear to this Court to be anything but reasoned in his approach.

The test for whether a competency hearing is mandated is not whether a defendant was insane at some point in the past, or whether he was free of all mental illnesses at the time of the waiver. *State v. Harding*, 137 Ariz. 278, 286, 670 P.2d 383, 391 (1983). Rather, it is whether, on the basis of facts and circumstances known to the trial judge, there was or should have been a good faith doubt about Defendant's ability to understand the nature and consequences of the waiver, or to participate intelligently in the proceedings and make a reasoned choice among the alternatives presented. *State v. Martin*, 102 Ariz. 142, 146, 426 P.2d 639, 643 (1967).

Again, this Court had the opportunity to read the Defendant's motions, listen to his arguments, and to observe his behavior and demeanor at numerous *pro se* appearances during the pretrial and trial phases. Based on those observations, this Court concluded that Defendant's thoughts and actions demonstrated coherent and rational behavior.

Defendant, concerned about whether he could represent himself, requested multiple continuances, subsequently asked for hybrid representation during trial when complicated DNA evidence was being presented, and expressed often on the record his frustration with jail facilities, access to records and research, and communication with advisory counsel. All of these actions demonstrated appropriate and logical conduct on Defendant's part.

The Court is a *de facto* witness and may consider its own observations in making a competency determination. *State v. Glassel*, 211 Ariz. 33, 116 P.3d 1193 (2005). Doubts about a defendant's competence may be removed by his conduct in court proceedings. *See State v. Conde*, 174 Ariz. 30, 846 P.2d 843 (App. 1992).

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The Court's observations about Defendant's competence over a 2-1/2 year time period, including the nearly 3 months of concentrated trial time, have been borne out over the intervening years as Defendant, to the Court's knowledge, has not been placed on medication, there is no evidence that he suffered from delusions (other than comments Defendant made during a neuropsychological evaluation more than four years post-trial), there was no psychiatric intervention, and he was able to write lucid pleadings.

The right to represent oneself is a constitutional right. *Faretta v. California*, 422 U.S. 806, 819–20, 95 S.Ct. 2525, 2533 (1975). A demand to proceed *pro se* should be unequivocal. *State v. Hanson*, 138 Ariz. 296, 300, 674 P.2d 850, 854 (App.1983). Courts therefore are to indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

As Defendant's Petition points out, in order to waive counsel and represent himself, a defendant must be competent. *See State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998). Under the Due Process Clause of the Fourteenth Amendment, the competency standard for waiving the right to counsel is the same as the competency standard for standing trial. *See Godinez v. Moran*, 509 U.S. 389, 399–400, 113 S.Ct. 2680 (1993). A defendant is competent to stand trial if he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788 (1960).

In this case, this Court never questioned the Defendant's competence, nor were any issues raised by the Deputy Public Defender who had been representing him for quite some time. The Court did not believe a competency hearing was warranted. Indeed, Defendant made it abundantly clear that he would object to such a hearing and would not cooperate if it had been ordered. Thus, in the Court's view, Defendant's waiver of counsel was a knowing, voluntary, and intelligent decision on the part of a competent individual.

If at any point in the proceedings this Court saw any evidence of Defendant's incompetence that would have placed his right to continue waiving counsel in jeopardy, an immediate hearing would have been held. Defendant's public defender and advisory counsel also would have immediately sought a hearing, but never did, if they believed for a minute that Defendant's competence was an issue. Based upon the foregoing, the Deputy Public Defender did not act unreasonably in failing to challenge Defendant's competency before he was allowed to waive counsel, nor was his performance deficient at any point during his representation.

**B. Advisory Counsel**



# Exhibit 18

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Clarence Wayne Dixon,  
Petitioner,  
vs.

Charles L. Ryan, et al.,  
Respondents.

CV-14-258-PHX-DJH  
DEATH-PENALTY CASE

**PETITION FOR WRIT OF HABEAS CORPUS**  
**28 U.S.C. § 2254**

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# Exhibit 19

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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Clarence Wayne Dixon,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.  
14

No. CV-14-258-PHX-DJH

**ORDER**

DEATH PENALTY CASE

15 Clarence Dixon is an Arizona death row inmate. Before the Court is Dixon's  
16 petition for writ of habeas corpus. (Doc. 27.) Respondents filed an answer to the petition,  
17 and Dixon filed a reply. (Docs. 36, 39.) Also before the Court is Dixon's motion for  
18 evidentiary development, which Respondents oppose. (Docs. 49, 55.) For the reasons set  
19 forth below, the Court concludes that Dixon is not entitled to habeas relief or evidentiary  
20 development.

21 **I. BACKGROUND**

22 In 2008, Dixon was convicted of first-degree murder and sentenced to death for  
23 the 1978 murder of Deana Bowdoin. The following facts surrounding the crime are taken  
24 from the opinion of the Arizona Supreme Court upholding the conviction and sentence.  
25 *State v. Dixon*, 226 Ariz. 545, 548–49, 250 P.3d 1174, 1177–78 (2011).

26 On January 6, 1978, Deana, a 21-year-old Arizona State University senior, had  
27 dinner with her parents and then went to a nearby bar to meet a female friend. The two  
28 arrived at the bar at 9:00 p.m. and stayed until approximately 12:30 a.m., when Deana

1 Dr. Marchildon found no evidence of mental illness. He concluded that Dixon  
2 understood the charges and the nature of the legal proceedings. (*Id.*) He noted that  
3 Dixon's "hospital stay has been uneventful. He has participated in psychotherapeutic  
4 sessions, has received no neuroleptic drugs, and has displayed no behavior or ideation  
5 which would indicate mental illness." (*Id.*)

6 On December 5, 1977, Dixon appeared before Judge O'Connor, waived his right  
7 to a jury trial, and agreed that the case could be determined on the record. (*See id.* App.  
8 M.) On January 5, 1978, Judge O'Connor found Dixon "not guilty by reason of insanity."  
9 (*Id.*) The Court ordered that Dixon remain released pending civil proceedings. (*Id.*)  
10 Dixon murdered Deana less than two days later.

11 A second basis for allegations of incompetence is Dixon's so-called  
12 "perseveration" and "delusional conduct" concerning a particular legal issue arising from  
13 the 1985 rape case. This issue involved Dixon's theory that NAU officers lacked the  
14 statutory authority to investigate the case; therefore, according to Dixon, his prior  
15 conviction was "fundamentally flawed" and the DNA comparison made pursuant to his  
16 invalid conviction should be suppressed. (*See* ROA 143 at 8, 9.)<sup>3</sup> In his motion to the trial  
17 court, Dixon noted that his argument regarding the lack of statutory authority to  
18 investigate was rejected in the 1985 proceedings; he also listed other instances in which  
19 he had raised the claim and it had been denied. (*Id.* at 3–4.) Dixon was convinced,  
20 however, that the issue was never "fully and correctly adjudicated." (*Id.* at 9.)

21 1. Claim 1

22 Dixon alleges that he received ineffective assistance of trial counsel when his  
23 lawyer failed to challenge Dixon's competency to stand trial and to waive counsel. (Doc.  
24 27 at 43.) The PCR court denied this claim on the merits. (ME 7/2/13.)<sup>4</sup>

25 a. Background

26  
27 <sup>3</sup> "ROA" refers to the record on appeal from Dixon's trial and sentencing (Case  
28 No. CR-08-0025-AP).

<sup>4</sup> "ME" refers to the minute entries of the state court.



1 The Maricopa County Public Defender's Office initially represented Dixon. His  
2 case was assigned to Vikki Liles, who was joined by Garrett Simpson as second chair in  
3 July 2005. Liles objected to court-ordered testing of Dixon's IQ and to a pre-screening  
4 evaluation for competency and sanity. (ROA 35, 36.) At a hearing in April 2004, Liles  
5 reiterated that Dixon would not participate in an IQ test or a competency examination.  
6 (ME 4/16/03.) Liles told the court, however, that Dixon's mental health needed to be  
7 investigated for a possible insanity defense and as a potential mitigating circumstance.  
8 (RT 4/16/03.)<sup>5</sup> On September 25, 2003, Liles filed a Notice of Possible Insanity Defense.  
9 (ROA 68.) In April 2005, however, Liles informed the court that Dixon would not offer  
10 an insanity defense. (ME 4/15/05.)

11 In February 2006, Simpson replaced Liles as lead counsel. He drafted a Motion to  
12 Dismiss, arguing that Dixon's sanity had not been restored at the time of the murder. (*See*  
13 PCR Pet., Ex. E) Thereafter, Dixon moved to waive counsel. (ROA 131.) The court  
14 granted the motion after a colloquy with Dixon. (RT 3/16/06; ME 3/16/06.) Simpson was  
15 appointed as advisory counsel. (ME 3/23/06.)

16 In his PCR petition, Dixon alleged that Simpson performed ineffectively by failing  
17 to challenge Dixon's competency to waive counsel. (PCR Pet. at 10.) He contended that  
18 Simpson was on notice of Dixon's lack of competence based on his knowledge of the  
19 1977 Rule 11 exams and not guilty by reason of insanity verdict ("NGRI"), and because  
20 of Dixon's "perseveration" on the "NAU issue." (*Id.*)

21 During the PCR proceedings, Dr. John Toma performed a "full  
22 neuropsychological and psychological evaluation" of Dixon. In his report, dated June 30,  
23 2012, Dr. Toma diagnosed Dixon with schizophrenia, paranoid type. (PCR Pet., Appx. A  
24 at 24.) According to Dr. Toma, Dixon "was clearly not capable of representing himself  
25 and his competence to proceed should have been questioned, especially given the fact  
26

27  
28 <sup>5</sup> "RT" refers to the court reporter's transcript.

1 that he was not treated for his psychiatric disorder, the main symptom of which is  
2 paranoid ideation.” (*Id.*)

3       ***b. Ineffective Assistance of Counsel***

4       Claims of ineffective assistance of counsel are governed by the principles set forth  
5 in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a  
6 petitioner must show that counsel’s representation fell below an objective standard of  
7 reasonableness and that the deficiency prejudiced the defense. *Id.* at 687–88.

8       The inquiry under *Strickland* is highly deferential, and “every effort [must] be  
9 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of  
10 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at  
11 the time.” *Id.* at 689; see *Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Bobby v.*  
12 *Van Hook*, 558 U.S. 4 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th Cir.  
13 2010). To satisfy *Strickland*’s first prong, a defendant must overcome “the presumption  
14 that, under the circumstances, the challenged action might be considered sound trial  
15 strategy.” *Id.*

16       With respect to *Strickland*’s second prong, a defendant must affirmatively prove  
17 prejudice by “show[ing] that there is a reasonable probability that, but for counsel’s  
18 unprofessional errors, the result of the proceeding would have been different. A  
19 reasonable probability is a probability sufficient to undermine confidence in the  
20 outcome.” *Id.* at 694.

21       “Surmounting *Strickland*’s high bar is never an easy task,” *Padilla v. Kentucky*,  
22 559 U.S. 356, 371 (2010), and “[e]stablishing that a state court’s application of *Strickland*  
23 was unreasonable under § 2254(d) is all the more difficult.” *Richter*, 562 U.S. at 105. As  
24 the Court explained in *Richter*:

25       Even under *de novo* review, the standard for judging counsel’s  
26 representation is a most deferential one. Unlike a later reviewing court, the  
27 attorney observed the relevant proceedings, knew of materials outside the  
28 record, and interacted with the client, with opposing counsel, and with the  
judge. It is “all too tempting” to “second-guess counsel’s assistance after  
conviction or adverse sentence.” [*Strickland*, 466 U.S.] at 689. The

1 question is whether an attorney's representation amounted to incompetence  
2 under "prevailing professional norms," not whether it deviated from best  
3 practices or most common custom. [*Id.*] at 690.

4 Establishing that a state court's application of *Strickland* was  
5 unreasonable under § 2254(d) is all the more difficult. The standards  
6 created by *Strickland* and § 2254(d) are both "highly deferential," and when  
7 the two apply in tandem, review is "doubly" so. The *Strickland* standard is  
8 a general one, so the range of reasonable applications is substantial. Federal  
9 habeas courts must guard against the danger of equating unreasonableness  
10 under *Strickland* with unreasonableness under § 2254(d). When § 2254(d)  
11 applies, the question is not whether counsel's actions were reasonable. The  
12 question is whether there is any reasonable argument that counsel satisfied  
13 *Strickland*'s deferential standard.

14 *Id.* (additional citations omitted); see *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)  
15 (discussing "doubly deferential judicial review that applies to a *Strickland* claim under  
16 the § 2254(d)(1) standard").

17 *c. Analysis*

18 In rejecting this claim during the PCR proceedings, Judge Andrew Klein, who also  
19 presided over Dixon's trial, explained that at the time Dixon waived counsel the court  
20 was aware of the 1977 Rule 11 proceedings and NGRI verdict, as well as the fact that  
21 Dixon's counsel were contemplating an insanity defense in this trial. (ME 7/2/13 at 5.) As  
22 Judge Klein explained, "this Court was in possession of information that placed  
23 Defendant's mental health at issue. . . . Defendant's counsel could not have been  
24 ineffective in failing to give the Court information it already had." (*Id.*)

25 Judge Klein Court further noted that Dixon "was adamant that he would not  
26 submit to [a competency evaluation]." (*Id.*) In an affidavit prepared in 2013, Simpson  
27 likewise attested that "Dixon was vehemently opposed" to "seeking a determination of  
28 competency."<sup>6</sup> (PCR Pet., Appx. C at 2, ¶ 7.)

---

<sup>6</sup> Simpson also stated in his affidavit that he had initially prepared the motion to  
dismiss based on the 1978 insanity verdict, but before he could speak with Dixon's  
counsel on the 1977 case, the attorney was quoted in a local publication as having stated

1 As a basis for his conclusion that Dixon was not incompetent, Judge Klein also  
2 discussed his first-hand impressions of Dixon:

3 This Court has a history with this Defendant before the March 16,  
4 2006 hearing on the waiver of counsel and remembers him well. During  
5 Defendant's previous appearances, the Court had ample opportunity to  
6 observe Defendant, speak with him, and review his written work product.  
7 At all times, the Court found Defendant to be able to adequately advance  
8 his positions, he was cogent in his thought processes, lucid in argument,  
9 and always able to respond to all questions with appropriate answers. At no  
time did Defendant appear to this Court to be anything but reasoned in his  
approach.

10 (ME 7/2/13 at 6.) Finally, the court noted that the record did not contain evidence of  
11 mental health issues following the NGRI verdict:

12 Twenty-seven years elapsed between the date of the murder and the date of  
13 the March 2006 hearing on Defendant's competence to intelligently,  
14 knowingly and voluntarily waive counsel and to proceed *pro se*. Defendant  
15 makes no suggestion that either his competency or his sanity were of  
16 concern in proceedings related to the intervening crimes in Maricopa  
17 County (late 1978 court proceedings) or in Coconino County (1985 court  
proceedings; 1987 appellate decision) notwithstanding the early-1978  
NGRI finding. Moreover, Defendant provides no evidence that he required  
treatment for the mental illness or that it interfered with his functioning.

18 (*Id.* at 12.)

19 The court concluded that Simpson "did not act unreasonably in failing to challenge  
20 Defendant's competency before he was allowed to waive counsel, nor was his  
21 performance deficient at any point during his representation." (*Id.* at 7.) The court's  
22 ruling was neither contrary to nor based on an unreasonable application of clearly  
23 established federal law, nor was it based on an unreasonable determination of the facts.  
24 28 U.S.C. § 2254(d).

25  
26 that Dixon was not mentally ill and had "conned" Judge O'Connor. (*Id.* at ¶¶ 5–6.)  
27 Simpson spoke with the attorney, who "maintained that he made no such statements," but  
28 nonetheless Simpson "felt compelled to move to withdraw" as advisory counsel. (*Id.* at ¶  
6.) Simpson also attested that Dixon was "adamant that he did not want to be  
characterized as insane or mentally ill. I should have seen this as a symptom of his illness  
but I did not." (*Id.* at ¶ 7.)



1 A criminal defendant has a Sixth Amendment right to waive counsel and conduct  
2 his own defense. *Faretta v. California*, 422 U.S. 806, 819 (1975). However, he may not  
3 waive his right to counsel unless he does so “competently and intelligently.” *Godinez v.*  
4 *Moran*, 509 U.S. 389, 396 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)).  
5 The standard for determining competency to waive counsel is the same as the standard  
6 for competency to be tried. *Id.* at 399. It requires that a defendant have (1) “‘a rational as  
7 well as factual understanding of the proceedings against him,’ and (2) ‘sufficient present  
8 ability to consult with his lawyer with a reasonable degree of rational understanding.’”  
9 *Stanley v. Cullen*, 633 F.3d 852, 860 (9th Cir. 2011) (quoting *Dusky v. United States*, 362  
10 U.S. 402, 402 (1960) (per curiam)). Whether a defendant is capable of understanding the  
11 proceedings and assisting counsel is dependent upon evidence of the defendant’s  
12 irrational behavior, his demeanor in court, and any prior medical opinions on his  
13 competence. *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

14 “A claim that counsel was deficient for failing to move for a competency hearing  
15 will succeed only when there are sufficient indicia of incompetence to give objectively  
16 reasonable counsel reason to doubt defendant’s competency, and there is a reasonable  
17 probability that the defendant would have been found incompetent to stand trial had the  
18 issue been raised and fully considered.” *Hibbler v. Benedetti*, 693 F.3d 1140, 1149–50  
19 (9th Cir. 2012) (quotations omitted). Dixon can make neither showing.

20 First, there were not sufficient indicia of incompetence to give Simpson reason to  
21 doubt Dixon’s competence. The fact that Dixon had a distant history of mental health  
22 problems was not in itself sufficient to show that he was incompetent to waive counsel.  
23 *See Hoffman v. Arave*, 455 F.3d 926, 938 (9th Cir. 2006) (“We have held that those with  
24 mental deficiencies are not necessarily incompetent to stand trial.”), *vacated on other*  
25 *grounds by Arave v. Hoffman*, 552 U.S. 117, 117–19 (2008) (per curiam)); *United States*  
26 *v. Garza*, 751 F.3d 1130, 1135–37 (9th Cir. 2014) (finding no need for competency  
27 hearing where defendant was diagnosed with anxiety and dementia but his behavior, in  
28 and out of court, was not erratic and there was no clear connection between any mental

1 disease and a failure on defendant's part to understand the proceedings or assist in his  
2 own defense); *Boyde v. Brown*, 404 F.3d 1159, 1166–67 (9th Cir. 2005) (finding inmate's  
3 "major depression" and "paranoid delusions" did not raise a doubt regarding his  
4 competence to stand trial). Dixon was initially found incompetent to stand trial for the  
5 1977 assault. Six weeks later, after hospitalization and treatment, he showed no signs of  
6 mental illness and was found competent. Apart from these events thirty years ago, with  
7 which the trial judge was already familiar, there was not a significant history of mental  
8 illness that Simpson failed to bring to the court's attention.

9 Finally, Dixon's obsession with the NAU suppression motion was not so bizarre  
10 as to suggest incompetence. "Criminal defendants often insist on asserting defenses with  
11 little basis in the law, particularly where, as here, there is substantial evidence of their  
12 guilt," but "adherence to bizarre legal theories" does not imply incompetence. *United*  
13 *States v. Jonassen*, 759 F.3d 653, 660 (7th Cir. 2014) (noting defendant's "persistent  
14 assertion of a sovereign-citizen defense"); see *United States v. Kerr*, 752 F.3d 206, 217-  
15 18 (2d Cir.), *as amended* (June 18, 2014) ("Kerr's obsession with his defensive theories,  
16 his distrust of his attorneys, and his belligerent attitude were also not so bizarre as to  
17 require the district court to question his competency for a second time."). "[P]ersons of  
18 unquestioned competence have espoused ludicrous legal positions," *United States v.*  
19 *James*, 328 F.3d 953, 955 (7th Cir. 2003), "but the articulation of unusual legal beliefs is  
20 a far cry from incompetence." *United States v. Alden*, 527 F.3d 653, 659–60 (7th Cir.  
21 2008) (explaining that defendant's "obsession with irrelevant issues and his paranoia and  
22 distrust of the criminal justice system" did not imply mental shortcomings requiring a  
23 competence hearing).

24 Apart from the NAU suppression issue, Dixon has failed to identify an instance in  
25 which he behaved irrationally, appeared not to understand the proceedings, or did not  
26 communicate effectively with counsel. See *Alexander v. Dugger*, 841 F.2d 371, 375 (11th  
27 Cir. 1988) (rejecting ineffective assistance of counsel claim when defendant made only  
28 "conclusory allegations that he was incompetent to stand trial" and gave "no concrete

1 examples suggesting that at the time of his trial he did not have the ability to consult with  
2 his lawyer or he did not understand the proceedings against him.”); *Stanley*, 633 F.3d at  
3 863 (finding that state court reasonably rejected prisoner’s ineffective assistance claim  
4 where the record contained “insufficient evidence of [the prisoner’s] incompetence  
5 during the guilt phase to justify a conclusion that defense counsel were ineffective in  
6 failing to move for competency proceedings.”).

7  
8 Second, there was not a reasonable probability that Dixon would have been found  
9 incompetent even if counsel had raised the issue. *Hibbler*, 693 F.3d at 1149–50. As an  
10 initial matter, Dixon was adamant that he did not want to be evaluated for competency.  
11 *See Douglas v. Woodford*, 316 F.3d 1079, 1086 (9th Cir. 2003) (explaining that counsel  
12 “did not err by failing to obtain further testing, as [counsel] could not secure such testing  
13 without his client’s cooperation”). In addition, Judge Klein was familiar with Dixon’s  
14 past mental health issues, but having interacted with Dixon through several years of court  
15 proceedings, he observed no indications of incompetence. Under these circumstances, it  
16 is difficult to see how a competency examination would have been ordered even if  
17 Simpson had requested one. As discussed below, there is no reasonable probability that  
18 Dixon would have been found incompetent if he had undergone an evaluation.

19 The PCR court’s rejection of this claim satisfies neither § 2254(d)(1) nor (2). A  
20 “reasonable argument” could be made that Simpson “satisfied *Strickland*’s deferential  
21 standard.” *Richter*, 566 U.S. at 105; *see Hibbler*, 693 F.3d at 1150. The PCR court’s  
22 factual determinations were not objectively unreasonable in light of the state court record.  
23 *See Taylor*, 366 F.3d at 1000; *Hibbler*, 693 F.3d at 1149. Claim 1 is therefore denied.

## 24 2. Claims 2 and 3

25 In Claim 2, Dixon alleges that that he was tried and sentenced while legally  
26 incompetent. (Doc. 27 at 54.) Claim 3 consists of two allegations: that the trial court (A)  
27 “erred when it found [Dixon] competent to waive counsel and represent himself” and (B)  
28 “abdicated its obligation . . . to ascertain whether Dixon was competent to stand trial,  
despite the fact that considerable evidence was before the court he was not.” (*Id.* at 61,



66.) Dixon did not raise Claims 2 or 3(B) in state court. He raised Claim 3(A), which the PCR court denied on the merits. (ME 7/2/13 at 7.)

*a. Background*

On March 16, 2006, the trial court conducted a hearing on Dixon's request to waive counsel. The court first inquired why Dixon wished to represent himself. (RT 3/16/03 at 3–4.) Dixon explained that it involved a disagreement about a motion counsel did not feel she could legally or ethically file. (*Id.* at 4.)

The trial court warned Dixon that if he represented himself he would be held to the standards of a lawyer. (*Id.*) The court also noted there would be a significant delay in beginning the trial. (*Id.*) Dixon acknowledged there were over 3,000 documents that he needed to review. (*Id.*) He would also have to read the rules of criminal procedure and find a textbook on trial procedure and preparation. (*Id.* at 6.)

The court nevertheless explained that in setting a trial date it would have to balance competing interests, including those of the victims and the State, and might ultimately select a date when Dixon did not feel he was ready. (*Id.*) Dixon stated he was aware of that, but indicated that he was hindered in preparing for trial by the inefficiency of Inmate Legal Services. (*Id.*) The court explained that Dixon would not be afforded greater freedoms than other inmates and would not get everything he requested simply because he represented himself. (*Id.* at 6–7.) Dixon stated that he understood. (*Id.* at 7.)

Dixon told the court he had fourteen years of education, that he read and understood the English language, and that the only medication he had taken in the last twenty-four hours were “[a]sprin, ibuprofen, and that’s it.” (*Id.* at 7–8.) He told the court that he had not taken any psychotropic medications or anything that prevented him from understanding what the court was stating. (*Id.* at 8.) When asked if he had ever been in a Rule 11 proceeding for mental problems, Dixon responded that he had, “way back in 1977.” (*Id.*) The court inquired further:

THE COURT: Okay. But since then have you had any kind of mental problems that would prevent you from having a trial, that you’re aware of?

1 THE DEFENDANT: No, I'm not.

2  
3 THE COURT: Okay. And let me ask counsel if you know of any in your  
4 evaluation that would make this court's decision as to whether to grant the  
5 waiver of right to counsel in jeopardy.

6 [SIMPSON]: Not that I'm aware of.

7 (*Id.*)

8 The court told Dixon that "an attorney can be of great benefit to you" and there  
9 were "some significant dangers and disadvantages to representing yourself." (*Id.* at 9.)  
10 Dixon responded "I'm aware that a fool, a fool has himself for a client, yes." (*Id.* at 10.)

11 The court responded, "Not that you're a fool or anyone is a fool, but I have yet to  
12 see someone represent himself in this court and fare better than I think he or she would  
13 have done had they had a lawyer." (*Id.*) Dixon understood that in choosing to represent  
14 himself, he may have decreased his chance of success at trial. (*Id.*)

15 The court reiterated that Dixon had the right to an attorney who would represent  
16 him at all critical stages of trial. (*Id.*) Dixon said he understood. (*Id.*) The court asked  
17 Dixon whether he was aware that he was charged "with the most serious of crimes  
18 imaginable." (*Id.*) Dixon stated that he was. (*Id.*)

19 The court instructed the prosecutor to read the indictment to Dixon. (*Id.* at 11.)  
20 Dixon stated that he understood the charges and potential sentences. (*Id.* at 11-12.)

21 Dixon also indicated that he understood that if he were allowed to represent  
22 himself, he would have "sole responsibility for [his] defense, introducing witnesses,  
23 doing investigation, doing legal research, filing and arguing motions, examining and  
24 cross-examining witnesses, giving opening statement and final argument to the jury," and  
25 that because of his custody status he would have more difficulty investigating the case  
26 than attorneys would. (*Id.* at 12-13.) The court again explained Dixon would be held to  
27 the same standard as an attorney. (*Id.* at 13.) Dixon said he understood. (*Id.*) The court  
28 explained that "this type of case is probably the most complex of all criminal cases"; that  
the law is "complicated," "unsettled," and "constantly evolving"; that trying the case

1 required knowledge of both case law and statutory authority; and that the trial would  
2 involve numerous witnesses and exhibits. (*Id.* at 13–14.) Dixon stated that he was “aware  
3 of all that.” (*Id.* at 14.)

4 Dixon was also aware that in a capital case two certified lawyers are typically  
5 appointed to represent the defendant. (*Id.*) The court explained that if Dixon were given  
6 advisory counsel, “their job is not to try your case” or “give you advice,” but to “assist  
7 you as needed.” (*Id.*) Dixon acknowledged that if he represented himself, he “[bore] all  
8 responsibilities.” (*Id.*)

9 Dixon understood that he could change his mind about self-representation “at any  
10 time.” (*Id.* at 15.) He also understood that if he misbehaved or violated the rules, the court  
11 could have a lawyer take over the case. (*Id.* at 15–16.)

12 When asked if he had any questions about anything he had discussed with the  
13 court, Dixon replied “No, your Honor. I believe you’ll be fair and impartial in this case.”  
14 (*Id.* at 16.) The court then gave Dixon time to read the written waiver. (*Id.*) Dixon read  
15 the waiver, told the court he understood, and then signed it. (*Id.* at 17.)

16 The court gave Dixon’s counsel and the prosecutor the opportunity to make a  
17 record. (*Id.*) Neither suggested there was any reason to doubt Dixon’s competency. (*Id.* at  
18 17–18.)

19 Based upon Dixon’s answers, the avowals of counsel, and the totality of the  
20 circumstances, the trial court expressly found that Dixon had made a knowing,  
21 intelligent, and voluntary waiver of his right to counsel and was competent to represent  
22 himself. (*Id.* at 21–22.)

23 *b. Analysis: Claim 3(A)*

24 With respect to Claim 3(A), the PCR court, citing *Godinez*, 509 U.S. at 399–400,  
25 and *Dusky*, 362 U.S. at 402, found that Petitioner was competent and that his waiver of  
26 counsel was “knowing, voluntary, and intelligent.” (*Id.*) This decision was neither  
27 contrary to nor an unreasonable application of clearly established federal law, nor was it  
28 based on an unreasonable determination of the facts.

1           The PCR court stated that under *Godinez* “the competency standard for waiving  
2 the right to counsel is the same as the competency standard for standing trial.” (*Id.*)  
3 Dixon asserts that the standards for competency to be tried and competency for self-  
4 representation diverged with the Supreme Court’s opinion in *Indiana v. Edwards*, 554  
5 U.S. 164 (2008). In *Edwards*, the Court held that the Constitution “permits States to insist  
6 upon representation by counsel for those competent enough to stand trial . . . but who still  
7 suffer from severe mental illness to the point where they are not competent to conduct  
8 trial proceedings by themselves.” 554 U.S. at 178. The Court explained that a defendant  
9 who is otherwise able to satisfy the *Dusky* competence standard may nevertheless be  
10 “unable to carry out the basic tasks needed to present his own defense without the help of  
11 counsel.” *Id.* at 175–76. Accordingly, a court is permitted, but not required, to appoint  
12 counsel for a “gray area” defendant. *Edwards*, 554 U.S. at 175. The Ninth Circuit has  
13 interpreted *Edwards* as holding that “[t]he standard for a defendant’s mental competence  
14 to stand trial is now different from the standard for a defendant’s mental competence to  
15 represent himself or herself at trial.” *United States v. Ferguson*, 560 F.3d 1060, 1068 (9th  
16 Cir. 2009).

17           While noting that a “higher standard” applies to assessing a defendant’s  
18 competency for self-representation, compared to the competency to stand trial or to waive  
19 counsel, the Court in *Edwards* expressly declined to adopt a “specific standard” to  
20 determine when a defendant lacks the mental capacity to defend himself. 554 U.S. at  
21 172–76, 178. The Court noted that the trial judge “will often prove best able to make  
22 more fine-tuned mental capacity decisions, tailored to the individualized circumstances of  
23 a particular defendant.” *Id.* at 176.

24           Even under a “higher” standard, Dixon was competent to represent himself. As the  
25 PCR court made clear, Dixon was able to carry out the basic tasks needed to present his  
26 own defense. His behavior at trial was not “decidedly bizarre,” nor did he do “absolutely  
27 nothing” to defend himself at trial and sentencing. *Ferguson*, 560 F.3d 1068–69  
28 (remanding to determine applicability of *Edwards*). Instead, Dixon was clearly “aware of

1 what was occurring” and “participated extensively throughout his trial.” *United States v.*  
2 *Thompson*, 587 F.3d 1165, 1173 (9th Cir. 2009); *see United States v. Johnson*, 610 F.3d  
3 1138, 1146 (9th Cir. 2010) (finding district court did not err in concluding that defendants  
4 were competent to represent themselves, noting the “defendants gave opening statements,  
5 testified, examined and cross-examined witnesses, challenged jury instructions, and  
6 delivered closing arguments of significant length”).

7 In arguing that the trial court erred in finding he was competent to represent  
8 himself, Dixon again relies on the 1977 Rule 11 reports and NGRI verdict and his  
9 persistent pursuit of the NAU suppression issue. As already discussed, however, Judge  
10 Klein was aware of these issues at the time he found Dixon competent to waive counsel  
11 and represent himself.

12 Dixon also cites Dr. Toma’s report from 2012, which opined that Dixon “was  
13 clearly not capable of representing himself and his competence to proceed should have  
14 been questioned.” (PCR Pet., App. A. at 24.) Dr. Toma’s opinion was formed four years  
15 after Dixon’s trial. Judge Klein, who observed Dixon while presiding over pretrial and  
16 trial proceedings, “was in the best position to observe [Dixon’s] behavior and to make the  
17 determination that [he] had the mental capacity to represent [himself].” *Johnson*, 610  
18 F.3d at 1146; *see Edwards*, 554 U.S. at 177.

19 In his decision denying this claim during the PCR proceedings, the court noted  
20 that Dixon displayed no signs that he was not competent to represent himself. Judge  
21 Klein explained:

22 [T]his Court had the opportunity to read the Defendant’s motions, listen to  
23 his arguments, and to observe his behavior and demeanor at numerous *pro*  
24 *se* appearances during the pretrial and trial phases. Based on those  
25 observations, this Court concluded that Defendant’s thoughts and actions  
demonstrated coherent and rational behavior.

26 Defendant, concerned about whether he could represent himself,  
27 requested multiple continuances, subsequently asked for hybrid  
28 representation during the trial when complicated DNA evidence was being  
presented, and expressed often on the record his frustration with jail



1 facilities, access to records and research, and communications with  
2 advisory counsel. All of these actions demonstrated appropriate and logical  
3 conduct on Defendant's part.

4 The Court's observation about Defendant's competence over a 2½  
5 year time period, including the nearly 3 months of concentrated trial time,  
6 have been borne out over the intervening years as Defendant, to the Court's  
7 knowledge, has not been placed on medication, there is no evidence that he  
8 suffered from delusions (other than comments Defendant made during a  
9 neuropsychological evaluation more than four years post-trial), there was  
10 no psychiatric intervention, and he was able to write lucid pleadings.

11 (ME 7/2/13 at 6–7.)

12 On habeas review, a state court's determination that the petitioner was competent  
13 is entitled to a presumption of correctness unless that determination is rebutted by clear  
14 and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Torres v. Prunty*, 223 F.3d 1103,  
15 1110 n. 6 (9th Cir. 2000). In *Demonsthenes v. Baal*, 495 U.S. 731, 735 (1990), the  
16 Supreme Court reiterated that a state court's conclusion regarding a defendant's  
17 competency is a factual determination that is entitled to a presumption of correctness. *Id.*  
18 (citing *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam)); *Evans v. Raines*, 800  
19 F.2d 884, 887 (9th Cir. 1986).

20 Based on the facts discussed above, and supported by this Court's review of the  
21 state court record, including the pretrial and trial transcripts, the PCR court's  
22 determination that Dixon was competent to waive counsel was not an unreasonable  
23 determination of the facts pursuant to § 2254(d)(2), *Maggio v. Fulford*, 462 U.S. at 117,  
24 nor was it contrary to or an unreasonable application of clearly established federal law  
25 under § 2254(d)(1). Claim 3(A) is denied.

26 *c. Analysis: Claims 2 and 3(B)*

27 As noted, Dixon did not raise these claims in state court, so they are procedurally  
28 defaulted. Dixon asserts that under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the  
ineffective assistance of his PCR counsel constitutes cause and prejudice to excuse the  
default. Dixon is incorrect. *Martinez* held that "[i]nadequate assistance of counsel at

1 initial-review collateral proceedings may establish cause for a prisoner's procedural  
2 default of *a claim of ineffective assistance at trial*." *Martinez*, 132 S. Ct. at 1315  
3 (emphasis added). *Martinez* applies only to ineffective assistance of trial or, in the Ninth  
4 Circuit, appellate counsel. It has not been expanded to other types of claims. *Pizzuto v.*  
5 *Ramirez*, 783 F.3d 1171, 1177 (9th Cir. 2015) (explaining that the Ninth Circuit has "not  
6 allowed petitioners to substantially expand the scope of *Martinez* beyond the  
7 circumstances present in *Martinez*"); *Hunton v. Sinclair*, 732 F.3d 1124, 1126–27 (9th  
8 Cir. 2013) (denying petitioner's claim that *Martinez* permitted the resuscitation of a  
9 procedurally defaulted *Brady* claim, holding that only the Supreme Court could expand  
10 the application of *Martinez* to other areas).

11 Because Claims 2 and 3(B) do not allege ineffective assistance of trial or appellate  
12 counsel, their default cannot be excused under *Martinez*. Because Dixon does not show  
13 cause for his default of either claim in state court, or a fundamental miscarriage of justice,  
14 the claims are barred from federal review. The claims are also meritless because, as  
15 discussed above, the trial court adequately addressed the issue of Dixon's competence  
16 and reasonably determined that he was competent to stand trial and represent himself.

17 3. Claim 4

18 Dixon alleges that his Sixth and Fourteenth Amendment rights were violated when  
19 advisory counsel failed to raise the issue of his competency with the trial court. (Doc. 27  
20 at 69.) The PCR court rejected this claim on the merits. (ME 7/2/13 at 8–9.) The court  
21 explained that Dixon, having voluntarily and intelligently waived counsel, had "no  
22 constitutional right to challenge the advice or services provided by advisory counsel." (*Id.*  
23 at 8.) The court further determined that even if such a right existed, there was no  
24 ineffective assistance of advisory counsel because the court was already aware of Dixon's  
25 mental health issues. (*Id.* at 9.) This decision does not entitle Dixon to relief under §  
26 2254(d).

27 After the trial court found Dixon competent and accepted his waiver of counsel, it  
28 appointed Simpson to serve as advisory counsel. After Simpson withdrew, the court



# Exhibit 20

No. 16-99006

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

CLARENCE WAYNE DIXON,  
Petitioner-Appellant,

vs.

CHARLES RYAN, et. al,  
Respondents-Appellees.

---

On Appeal from the United States District Court  
for the District of Arizona  
Case No. 2:14-cv-00258-DJH

---

**OPENING BRIEF OF APPELLANT**

---

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17 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
18 **IN AND FOR THE COUNTY OF PINAL**

19 STATE OF ARIZONA,  
20  
21 Plaintiff,  
22  
23 vs.  
24  
25 CLARENCE WAYNE DIXON,  
26 Defendant.

Pinal County Case No.  
S1100CR202200692

Maricopa County Case No. CR2002-  
019595

Arizona Supreme Court Case No. CR-  
08-0025-AP

**PRE-HEARING MEMORANDUM  
RE: CONSTITUTIONALLY  
REQUIRED DEFINITION OF  
"MENTALLY INCOMPETENT TO  
BE EXECUTED" AND STANDARD  
FOR PROVING THE SAME**

**(Capital Case)**

**(Hon. Robert Carter Olson)**

28 Clarence Dixon is a 66-year-old legally blind man of Native American ancestry,

1 who has long suffered from a psychotic disorder—paranoid schizophrenia. Previously, an  
 2 Arizona court determined that he was mentally incompetent and legally insane. Mr. Dixon  
 3 has a documented history of delusions, auditory and visual hallucinations, and paranoid  
 4 ideation.

5 On April 8, 2022, Mr. Dixon moved this Court to determine his competency to be  
 6 executed pursuant to A.R.S. § 13-4021 et seq. *State of Arizona v. Clarence Wayne Dixon*,  
 7 No. S1100CR202200692 (Pinal Cnty. Super. Ct. Apr. 8, 2022). That same day, the Court  
 8 found Mr. Dixon’s motion timely and that it “satisfies the minimum required showing that  
 9 reasonable grounds exist for the requested examination and hearing, within the meaning  
 10 of A.R.S. § 13-4022(C) and as otherwise required by *Ford v. Wainwright*[, 477 U.S. 399  
 11 (1986)].” Order, *State of Arizona v. Clarence Wayne Dixon*, No. S1100CR202200692  
 12 (Pinal Cnty. Super. Ct. April 8, 2022).

13 The Court set the matter for a scheduling hearing on Tuesday, April 12, 2022 at 3:30  
 14 p.m. and ordered that “[i]f there is any disagreement as to the presumption, burden, standard,  
 15 or any procedural requirement mandated by *Ford* or other authority, a memorandum is to  
 16 be filed by Monday, April 18, 2022, with any response by Friday, April 22, 2022. *Id.* In  
 17 accordance with the Court’s Order, Mr. Dixon respectfully submits his Pre-Hearing  
 18 Memorandum Regarding the Constitutionally Required Definition of “Mentally  
 19 Incompetent to be Executed” and the Standard for Proving the Same.

#### 20 **Memorandum of Points and Authorities**

21 As set forth below, the definition of “mentally incompetent to be executed” found in  
 22 A.R.S. § 13-4021(B) is unconstitutional as it squarely conflicts with the definition laid out  
 23 by the Supreme Court in *Panetti v. Quarterman*. 551 U.S. 930, 958 (2007). Whereas A.R.S.  
 24 § 13-4021(B) deems a person mentally incompetent to be executed where he is “presently  
 25 unaware that he is to be punished for the crime of murder” or “is unaware that the  
 26 impending punishment for that crime is death,” A.R.S. § 13-4021(B) (emphasis added), the  
 27 Eighth and Fourteenth Amendments require more than a person’s mere “awareness” of the  
 28 crime and impending punishment. Rather, in order to be mentally competent for execution,

1 a prisoner must have a rational understanding of the State's rationale for his execution—  
 2 that is, he must be able to "comprehend[] the meaning and purpose of the punishment to  
 3 which he has been sentenced." *Panetti*, 551 U.S. at 960.

4 Likewise, the standard of proof set forth in A.R.S. § 13-4022(F) requiring Mr. Dixon  
 5 to prove his mental incompetency to be executed by "clear and convincing evidence" is  
 6 unconstitutional and contrary to *Cooper v. Oklahoma* where the Supreme Court held that  
 7 requiring a criminal defendant to prove incompetency by clear and convincing evidence "is  
 8 incompatible with the dictates of due process" because it allows the State to try "a defendant  
 9 who is more likely than not incompetent." 517 U.S. 348, 369 (1996). The heightened  
 10 standard imposed by Arizona law creates the risk that Arizona will execute Mr. Dixon when  
 11 he is more likely than not incompetent in violation of his Eighth and Fourteenth Amendment  
 12 rights to due process and freedom from cruel and unusual punishment. The Constitution  
 13 requires that the standard of proof applicable to Mr. Dixon's claim that he is incompetent  
 14 to be executed be at a minimum, preponderance of the evidence.

15 **I. The definition of "mentally incompetent to be executed" set forth in A.R.S. §**  
 16 **13-4021(B) is unconstitutional**

17 A.R.S. § 13-4021(B) sets forth the definition of "mental incompetency to be  
 18 executed," providing that "'mentally incompetent to be executed' means that due to a  
 19 mental disease or defect a person who is sentenced to death is presently **unaware** that he  
 20 is to be punished for the crime of murder or that he is **unaware** that the impending  
 21 punishment for that crime is death." A.R.S. § 13-4021(B) (emphasis added).

22 Arizona's standard for adjudicating an individual's competency to be executed  
 23 conflicts with the federal constitutional standard. The controlling competency standard  
 24 was defined by the Supreme Court in *Panetti* where it held that mental competence  
 25 requires a prisoner to be able to "reach a rational understanding of the reason for the  
 26 execution." 551 U.S. at 958. The Court repudiated the awareness standard (like the one in  
 27 Arizona's statute), holding that a competency standard that only examines "whether a  
 28 prisoner is aware 'that he [is] going to be executed and why he [is] going to be executed'"

1 is “too restrictive to afford a prisoner the protections granted by the Eighth Amendment.  
 2 *Id.* at 956–57 (alteration in original) (citation omitted). The Court held that a prisoner’s  
 3 simple awareness that he is going to be executed and even his “awareness of the State’s  
 4 rationale for an execution” is insufficient. *Id.* at 959. The prisoner must also have a rational  
 5 understanding of the State’s reason for the execution, *id.*, meaning that he must be able to  
 6 “comprehend[] the *meaning and purpose* of the punishment to which he has been  
 7 sentenced, *id.* at 960 (emphasis added). The Court reasoned that “[t]he principles set forth  
 8 in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the  
 9 State’s announced reason for a punishment or the fact of an imminent execution, as  
 10 opposed to the real interests the State seeks to vindicate.” *Id.* (internal citation omitted).

11 Arizona’s standard for competency narrows review to a prisoner’s awareness of the  
 12 crime for which he is to be punished and of the impending punishment of death, *see* A.R.S.  
 13 § 13-4021(B), which is unconstitutional under *Panetti*. After *Panetti*, “[t]he critical  
 14 question is whether a prisoner’s mental state is so distorted by a mental illness that he  
 15 lacks a rational understanding of the State’s rationale for [his] execution. Or similarly put,  
 16 the issue is whether a prisoner’s concept of reality is so impair[ed] that he cannot grasp  
 17 the execution’s meaning and purpose or the link between [his] crime and its punishment.”  
 18 *Madison v. Alabama*, 139 S. Ct. 718, 723 (2019) (cleaned up).

## 19 II. The standard of proof set forth in A.R.S. § 13-4022(F) is unconstitutional

20 The statutorily imposed requirement in A.R.S. § 13-4022(F) that a prisoner establish  
 21 his incompetence by clear and convincing evidence is unconstitutional under the Fourteenth  
 22 Amendment’s Due Process Clause and the Eighth Amendment. As explained below, once  
 23 a prisoner shows by a preponderance of evidence that he is more likely than not incompetent  
 24 to be executed, he has met his constitutionally mandated burden.

25 A.R.S. § 13-4022 provides that a “[p]risoner may be found incompetent to be  
 26 executed only on clear and convincing evidence of incompetency.” A.R.S. § 13-4022(F).  
 27 This standard of proof conflicts with Supreme Court precedent. *See Cooper*, 517 U.S. 348.  
 28 In *Cooper*, the Court struck down Oklahoma’s requirement that a defendant prove mental



1 incompetence to stand trial by clear and convincing evidence, holding that requiring a  
 2 criminal defendant to prove his incompetence by clear and convincing evidence “is  
 3 incompatible with the dictates of due process” because it allows the State to try “a defendant  
 4 who is more likely than not incompetent.” *Id.* at 369. The Court’s reasoning in *Cooper*  
 5 squarely applies here:

6 In cases in which competence is at issue, we perceive no sound basis for  
 7 allocating to the criminal defendant the large share of the risk which  
 8 accompanies a clear and convincing evidence standard. We assume that  
 9 questions of competence will arise in a range of cases including not only  
 10 those in which one side will prevail with relative ease, but also those in which  
 11 it is more likely than not that the defendant is incompetent but the evidence  
 12 is insufficiently strong to satisfy a clear and convincing standard. While  
 important state interests are unquestionably at stake, in these latter cases the  
 defendant’s fundamental right to be tried only while competent outweighs  
 the State’s interest in the efficient operation of its criminal justice system.

13 *Id.* at 366–67.

14 What the Court held in *Cooper* applies with equal force here. “For the [prisoner]  
 15 the consequences of an erroneous determination of competence [to be executed] are dire.”  
 16 *Id.* at 364–65. “By comparison to the [prisoner’s] interest, the injury to the State of the  
 17 opposite error – a conclusion that the [prisoner] is incompetent when he is in fact  
 18 malingering – is modest.” *Id.* While the application of a preponderance standard in the  
 19 context of a *Ford* proceeding could result in an error prejudicial to the State, as the Court  
 20 explained in *Cooper*, “the error is subject to correction in a subsequent proceeding and the  
 21 State may detain the incompetent [prisoner] for “the reasonable period of time necessary  
 22 to determine whether there is a substantial probability that he will attain [competence] in  
 23 the foreseeable future.” *Id.* In fact, Arizona’s competence statute sets forth a procedure  
 24 for “recovery of competency” in A.R.S. § 13-4023.

25 The right to be executed only while competent, like the right to stand trial only  
 26 while competent, is protected by the constitutional right to due process. *See Ford*, 477  
 27 U.S. at 426–27 (Powell, J., concurring) (once a prisoner makes a substantial threshold  
 28 showing of insanity,” the process to determine his competency must meet the “basic

1 requirements” required by due process.) Both are fundamental constitutional rights. *See*  
2 *id.* at 409–10 (“[T]he Eighth Amendment prohibits a State from carrying out a sentence  
3 of death upon a prisoner who is insane.”) A standard of proof that permits the State to  
4 execute a person who is more likely than not incompetent is constitutionally intolerable.

5 In considering “whether a State’s procedures for guaranteeing a fundamental  
6 constitutional right are sufficiently protective of that right,” the *Cooper* Court recognized  
7 that “the State’s power to regulate procedural burdens was subject to proscription under  
8 the Due Process Clause if it ‘offends some principle of justice so rooted in the traditions  
9 and conscience of our people as to be ranked as fundamental.’” *Cooper*, 517 U.S. at 367–  
10 68 (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)). The Court ultimately  
11 held that “[t]he prohibition against requiring the criminal defendant to demonstrate  
12 incompetence by clear and convincing evidence safeguards the fundamental right not to  
13 stand trial while incompetent.” *Id.* at 369. The Court mandated that when determinations  
14 of competency are involved, the State may only require a criminal defendant “to shoulder  
15 the burden of proving his incompetence by a preponderance of the evidence,” and it may  
16 not do so by requiring the defendant to prove his incompetence by clear and convincing  
17 evidence. *Id.* at 355–56.

18 Because this is a “case[] in which competence is at issue” and in which the need to  
19 safeguard fundamental rights—i.e., the Eighth and Fourteenth Amendment right not to be  
20 executed while mentally incompetent—is at stake, Arizona’s standard requiring Mr.  
21 Dixon to prove his incompetence to be executed by clear and convincing evidence  
22 unconstitutionally “place[s] such an onerous burden on him as to violate his right to due  
23 process of law.” *See id.* at 353, 366–67. It would be constitutionally intolerable to execute  
24 Mr. Dixon if he is able to demonstrate he is “more likely than not incompetent.” *Id.* at  
25 355.

### 26 **III. Conclusion**

27 For the foregoing reasons, Mr. Dixon respectfully asks the Court to apply the  
28 *Panetti* and *Cooper* standards in these proceedings.

1 Respectfully submitted this 18th day of April, 2022

2 Jon M. Sands  
3 Federal Public Defender  
4 District of Arizona

5 Cary Sandman  
6 Amanda C. Bass  
7 Eric Zuckerman  
8 Assistant Federal Public Defenders

9 s/ Eric Zuckerman  
10 Counsel for Defendant  
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**Certificate of Service**

I hereby certify that on April 18, 2022, I electronically filed the foregoing Pre-Hearing Memorandum re: Constitutionally Required Definition of “Mentally Incompetent to Be Executed” and Standard for Proving the Same with the Pinal Clerk’s Office by using the Court’s eFiling system. Copies of the foregoing were electronically mailed this date to:

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s/ Jessica Golightly  
Assistant Paralegal  
Capital Habeas Unit

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ATTORNEYS FOR PLAINTIFF

7  
8 **SUPERIOR COURT OF ARIZONA**  
9 **COUNTY OF PINAL**

10 STATE OF ARIZONA,

11 Plaintiff,

12 -VS-

13 CLARENCE WAYNE DIXON,

14 Defendant.

No. S1100CR202200692

**NOTICE OF APPEARANCE**

*Hon. Robert Carter Olson presiding*

**[CAPITAL CASE]**

15 Plaintiff hereby notices the appearance of Assistant Attorney General  
16 GREGORY HAZARD as Plaintiff's counsel of record for these proceedings.  
17 Please also send all orders and other correspondence to the address indicated  
18 above.

19 DATED this 13th day of April, 2022.

20 Respectfully submitted,

21 Mark Brnovich  
22 Attorney General

23 Jeffrey L. Sparks  
24 Acting Chief Counsel  
25 Capital Litigation Section

26 /s/ Gregory Hazard  
27 Senior Litigation Counsel

28 Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on April 13, 2022, I electronically filed the foregoing with the Clerk of the Pinal County Superior Court by using the Court's eFiling Online System.

Copies of the foregoing were electronically mailed this date to:

The Honorable Robert Carter Olson  
Pinal County Superior Court  
c/o Connie Herrera, Judicial Assistant  
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/s/ S. Finch

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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF PINAL**

STATE OF ARIZONA,

Plaintiff,

v.

CLARENCE WAYNE DIXON,

Defendant,

LESLIE JAMES,

Crime Victim.

S1100CR202200692

**NOTICE OF APPEARANCE OF  
COUNSEL FOR VICTIM AND  
ASSERTION OF VICTIM'S  
CONSTITUTIONAL RIGHTS**

Crime Victim, LESLIE JAMES, by and through undersigned counsel, hereby provides NOTICE OF APPEARANCE OF COUNSEL pursuant to §13-4437(A) and Rule 39(d)(4) of the Arizona Rules of Criminal Procedure. Additionally, the Crime Victim hereby invokes and asserts rights pursuant to the Victims' Bill of Rights, Article II, Section 2.1 of the Arizona Constitution, Title 13, Chapter 40, Arizona Revised Statutes and Rule 39 of the Arizona Rules of Criminal Procedure. Pursuant to A.R.S. § 13-4437(D), counsel for the Crime Victim shall be endorsed on all pleadings. Counsel for the Crime Victim requests electronic service of all pleadings to colleen.avcv@gmail.com.

